No. 1086

In the Supreme Court of the United States

OCTOBER TERM, 1962

M. A. HOLAHAN, TRUSTEE, PETITIONER

v.

RUSSELL JACKSON and FRANCIS C. ROGERS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE DEFENDANTS IN OPPOSITION

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CITATIONS

Cases:

Magnum Import Company, Petitioner vs. Coty, 262 U. S. 922; 43 Supreme Court 531, 532; 67 L Ed. 922 — 4

Miscellaneous:

Supreme Court Rule No. 23 — 3

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OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit was not published, but a copy is appended as Appendix A to the Petition and the modification of the opinion is appended as Appendix B to the Petition.

JURISDICTION

The jurisdiction is correctly stated in the Petition for Certiorari.

STATEMENT

The bankrupt corporation, Gulf Securities of Louisiana, Inc., hereinafter referred to as "Gulf", entered into a contract with the City of Panama City, Florida on November 5, 1955, to perform certain services for the City in the sale of a $7,000,000 bond issue in connection with an improvement project. (Pltf.'s Exhibit 41, Tr. 277-278). Gulf was to receive a fee of eight per cent of the cash value of the bond issue, seven per cent or $490,000 upon the sale of the bonds, and one percent or $70,000 upon certain contingencies. The $70,000 payment is not involved in this litigation.

Under the terms of an agreement between defendants and Gulf (Exhibit 9, Tr. 70) defendants were to raise funds to be advanced to Gulf for use in carrying out Gulf's contract with the City, particularly in the sale of the bonds. This contract provided that in the event Del E. Webb Construction Company was not awarded the contract for the construction of the project, Gulf would refund all of such funds advanced, together with interest, and as security for the performance of this agreement Gulf on November 2, 1956, made an assignment of the agreement between Gulf and the City (Defendants' Exhibit A, Tr. 107).

On July 16, 1957, Gulf was paid the fee of $490,000 and on the same day delivered a cashier's check to defendants in the sum of $100,000 (Finding of Fact No. 3, Tr. 27). This $100,000 was refunded by the defendants to those who had advanced the money.

The Petition in Bankruptcy was filed July 16, 1957 and Gulf was adjudicated a bankrupt July 10, 1958 (Tr. 27).

The trustee in bankruptcy, the petitioner here, by his complaint sought to recover the $100,000 which the complaint alleges was received by defendants as an unlawful preferential payment from Gulf, an insolvent debtor.

ARGUMENT

The petition does not conform to the Rules of this Court (Rule 23). It is not a "concise statement of the case containing the facts material to the consideration of the questions presented", but is a lengthy argument on factual questions determined by the trial court and sustained by the Circuit Court of Appeals. They are not matters for review by this court and constitute no grounds for granting certiorari. The petitioner's argument has been answered by our briefs in the Circuit Court of Appeals and by the opinion handed down by that court. For us to enter into an extended argument on these issues at this time would serve no purpose except to violate the rules of this court.

REASONS FOR GRANTING WRIT

Under this heading Petitioner continues the argument on issues of fact, all of which were decided against him by the trial court and sustained by the Circuit Court of Appeals. The only attempt to state a reason why the Petition should be granted is contained in the "Conclusion" wherein the Petitioner states:

> "The questions presented all involve important questions of federal law, and particularly the rights of a trustee in bankruptcy. ————"

The Petition fails to state what important federal law or what rights of a trustee are involved.

There is nothing in the Findings of Fact (Tr. 27-34) or in the opinion of the Circuit Court of Appeals which furnish any grounds for review by the Supreme Court of the United States. Findings of Fact Nos. 14 and 15 (Tr. 31) are by themselves sufficient to justify the decision of the Circuit Court of Appeals. The court found that there was no fraud, actual or constructive, in the payment of the $100,000 and that at the time of the payment the defendants had no knowledge that Gulf was insolvent "nor did either of said defendants have any knowledge, information or suspicion that would place them, or either of them, on notice that the Gulf Securities of Louisiana, Inc. was insolvent or that any person whomsoever claimed that said company was insolvent."

This court has said that certiorari is granted for two purposes. First, to secure uniformity of decisions between the Circuit Courts and, second, to bring up questions of importance which it is in the public interest to have decided by the court of last resort.

> *Magnum Import Company, Petitioner* vs. *Coty*, 262 U. S. 922; 43 Supreme Court 531, 532; 67 L.Ed. 922

Neither of the purposes are present in this case.

CONCLUSION

It is therefore respectfully submitted that the Petition for Writ of Certiorari should be denied.

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AFFIDAVIT OF SERVICE

STATE OF ARIZONA }
County of Maricopa } ss.

FRANK E. FLYNN, being first duly sworn, on oath deposes and says:

That he is one of the attorneys for the respondents in the Brief in Opposition and that he has caused to be served copies of the foregoing Brief in Opposition on Paul J. Thriffiley, Jr., attorney for Petitioner, by depositing the same in the United States Post Office at Phoenix, Arizona, with first-class air mail postage prepaid, addressed to said Paul J. Thriffiley, Jr., counsel of record for petitioner, at 717 Richards Building, New Orleans 12, Louisiana.

.....

SUBSCRIBED and SWORN to before me this ..... day of May, 1963.

.....
Notary Public

My commission expires:

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